

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

----- x
The Authors Guild, Inc., Associational Plaintiff, :
Betty Miles, Joseph Goulden, and Jim Bouton, :
individually and on behalf of all others similarly :
situated, : Case No. 05 CV 8136-DC
Plaintiffs, :
: v. :
Google Inc., :
Defendant. :
----- x

EXHIBIT

2

[PART 3 OF 3]

**TO THE DECLARATION OF MICHAEL J. BONI IN SUPPORT OF PLAINTIFFS'
OPPOSITION TO DEFENDANT GOOGLE'S MOTION FOR SUMMARY JUDGMENT**

From inside the book

auto

19 pages matching auto in this book

Page 322

yer who didn't get his way in the auto cases, and isn't man enough to take a licking without whining, the way a good lawyer is supposed to do. No understanding whatsoever of the adversary system, which is my God after all what law is about, American style. It is disappointing. Cutler wrote Senator Abraham

Page 334

~~pushed evolution, with the television test, and its massive tax~~
nue demands, intervened. The auto industry, meanwhile, had encountered a more serious problem—the public furor over safety, stirred by Nader's exposés. General Motors, stupidly, hired a private detective to investigate Nader's private life.

Page 340

Three of the four attorneys working on the case recommended that the Justice Department bring both civil and criminal antitrust actions, and that the auto manufacturers and the AMA be indicted for a Sherman Act conspiracy in restraint of

From inside the book

banzhaf

11 pages matching banzhaf in this book

Page 363

proposed safety standard on auto bumpers.

The acronyms are no accident, for Banzhaf runs the only law course in the nation where writing press releases is part of the syllabus. Banzhaf considers the general public the students'

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"and they would go to some remote court, say in San Francisco, to make it harder for me, or look for a 'best-deal' court, where they could rely upon a friendly judge," Banzhaf said. The court where the first appeal is filed assumes jurisdiction over all future proceedings in the case, hence timing is important. "I

Page 366

agency. And he discarded conventional law teaching methods, where students spend dreary hours in the library memorizing appellate decisions. Banzhaf decided on the go-do-it approach.

"The danger in public-interest law is that you can become a Don Quixote, because you are up against some pretty big wind-

From inside the book

bank

24 pages matching bank in this book

Page 139

Kincaid, president of Central Bank & Trust Company, a smaller Lexington bank which competed with the merged banks, said the local U.S. District Court had been unable to obtain the stipulated divestiture agree-
ment.

Page 276

Doing a good job practicing before Congress can mean *avoiding* Congress. John H. Yingling, the bank lawyer-lobbyist we met earlier, knows when to fight and when to sidestep. When possible, he tries to keep his clients out of range of the irascible

Page 280

industry, for it dominates his state. But he is also a strong advocate of strict antitrust enforcement, so he refused Cutler's client's request. Several weeks later, the bill appeared under sponsorship of Senator Russell Long (D., La.). In the same vein, Senator Sam Ervin (D., N.C.) is noted among colleagues for

From inside the book

46 pages matching bill in this book

Page 84

Let's work this thing out together. Flexibility. In 1952 Clifford worked hard to obtain legislation authorizing pipelines to increase the price of natural gas, a bill of great benefit to client Phillips Petroleum. With the help of the oil industry's great

Page 193

of his Puerto Rican notes was not covered by his \$27 per diem allowance from the government. (The week-long stay at the Tryall Club with the ICC lawyers cost Cheseldine and his wife another \$496.55.) However, Congressional investigators found MCLA correspondence in which Cheseldine is quoted as asking

Page 337

Cutler, in rebuttal, denies that criminal penalties were ever a priority item for the industry, although it "did and does" oppose them. Further, he notes, criminal sanctions were never in the auto safety bill—neither in the original Johnson Administration submission nor in the versions reported from the House and

From inside the book

called

Search

50 pages matching called in this book

Page 136

certification relied upon data the FDA called "phony."

Chesebrough-Pond's, Inc., a longtime cosmetics manufacturer, moved into the drug field in the 1960s with a sustained-release aspirin called Measurin. Such drugs are valuable to arth-

Page 151

In the spring I called Corcoran's office and told a secretary what I was doing, and asked for an appointment. I'll get back to you. She didn't. I called again. I'll get back to you. She didn't. I called again. Mr. Corcoran says he is too busy and good luck.

By June my Corcoran file contained a stack of interview notes

Page 315

Assistant Secretary of the Navy called you, for instance, you felt he would not bother you unless he was serious." But oftentimes, Caplin said, the lawyer would go through a desultory recitation of his case and leave a memo for the IRS staff to study. "All he

From inside the book

commission

Search

69 pages matching **commission** in this book

Page 8

federal trade Commission, and elsewhere. The larger New York law firms—Cravath, Swaine and Moore; Paul, Weiss, Rifkind, Wharton and Garrison, to name two of a dozen—maintain Washington offices, partly for logistical and administrative convenience; but as one prominent Wall Street name told me,

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Cheseldine says. "If you will look at the spread, it is all over the country and there is no one law firm. I don't see how anybody can infer partiality, because the record down at the Commission, I think, speaks for itself. We don't have any complaints about it."

Page 199

—then assistant general counsel of the Federal Communications Commission, now a senior partner in Arent, Fox, Kintner, Plotkin and Kahn. Ken Cox, the former FCC Commissioner, states, "Harry was a hard regulator. The Commissioners would come

From inside the book

chairman

59 pages matching chairman in this book

Page 191

The turnover at Federal agencies is brisk. Paul Rand Dixon once estimated that the FTC hired 750 attorneys during his first five years as FTC chairman, just to maintain a 400-man level. The SEC loses about 75 of its 380 attorneys each year to private practice; the FPC, 10 of 70; the FCC, 35 of 200; the CAB, 20

Page 260

~~can persons may will be involved in both the preparation and~~
passage of the legislation." Cooley was also confident of a personal audience with Congressman Poage, his successor as chairman. Cooley wrote Peal: "While I realize that the chairman cannot possibly confer with all petitioners personally, I am cer-

Page 383

1970 affiliations of the members of the ABA's Division of Food, Drug and Cosmetic Law:

... The vice chairman of the division was general coun-

From inside the book

commissioner

31 pages matching **commissioner** in this book

Page 163

Commissioner William R. Connole wasn't happy being pressured by Tommy the Cork. Connole said Corcoran arrived late in the day and "asked my secretary for permission to see me. He had no appointment and had asked for none. He had not told me

Page 166

the head of a pin." Any conversation with a Commissioner relates back to a statement of fact. "You cannot say, 'Mr. Commissioner, I hope you will expedite that XYZ situation which I cannot identify to you by name.'" So long as agency staff mem-

Page 195

tain roughly the same language. There are variations. FCC members may not accept payment for writing, which the prolific Commissioner Nicholas Johnson estimates costs him \$15,000 a year.

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From inside the book

democratic

31 pages matching democratic in this book

Page 79

be titled "The Selling of the President 1948." "The basic premise of this memo—that the Democratic Party is an unhappy alliance of Southern conservatives, Western progressives, and big-city labor—is very trite, but it is also very true," Clifford wrote. "And it is equally true that the success or failure of the

Page 114

Arnold and Porter from Democratic politics. For two years after the Johnson Administration ended, the firm donated legal services to the Democratic National Committee, charging only for out-of-pocket expenses. Three

Page 151

Democratic Presidential campaign since 1940. Along the way: secretary to Justice Holmes; Reconstruction Finance Corporation; Labor Department; Public Works Administration; the SEC; administrative assistant to Roosevelt 1938–41; special assistant to Attorney General Francis Riddle during the war.

From inside the book

decision

47 pages matching **decision** in this book

Page 94

\$3-billion dump.

Clifford was not involved in the antitrust trial, in which Covington and Burling represented du Pont. "After the suit was all over, and the decision entered, Crawford Greenewalt, the du

Page 139

considerably smaller seventeen years earlier, with sales of slightly more than \$200 million—but was rapidly expanding in the lucrative Southwestern markets. The FTC decision is a masterpiece of something or other; lawyers who have studied the case haven't decided ex-

Page 238

each airline involved resorting to lawyers and lobbyists with political clout. In dizzying succession, the Civil Aeronautics Board overruled its own examiner's decision—one reached after three years of exhaustive study—only to be reversed in turn by John-

From inside the book

congress

Search

82 pages matching congress in this book

Page 254

to fault the Washington Lawyer as an *marvianus* for what is wrong with Congress is akin to blaming a single smoker for air pollution. But some Washington Lawyers are vital in the process through which Corporate America rules the United States; they contribute to the shortcomings of the system, and hence are

Page 293

The Corridors of Congress: Looking Down on Capitol Hill 293

Page 374

United States shall be a member of either house during his continuance in office." When a Kansas Senator named James Henry Lane accepted a brigadier's commission in the Civil War, the Senate promptly ejected him from Congress. Nor would the Justice Department permit Lyndon Johnson or Warren Magnuson

From inside the book

congressional

42 pages matching congressional in this book

Page 12

recruit venal Congressmen to perform bloody hatchet work on recalcitrants. A prime example: in 1959 a skittish Federal Power Commission chairman *volunteered* to a Congressional subcommittee the fact that Washing-

Page 283

notoriety supports the charge by a special committee on Congressional ethics of the Association of the Bar of the City of New York that "law practice has demonstrated a special potential for actual and alleged Congressional improprieties, and that law

~~practices have played a disreputable role in the history of~~

Page 396

Politics and the Regulatory Agencies, cited above. The Cohen quotations are from the GWLR issue cited above and an interview.

My discussion of Congressional ethics vis-à-vis law practices relies heavily upon *Congress and the Public Trust*, by James C. Kirby, Jr., Armin Rosencranz, and Ellen W. Ober, a report by the Special Committee on Congressional Ethics of the Association of the Bar of the City

From inside the book

Dobrivir

10 pages matching Dobrivir in this book

Page 374

to serve simultaneously in Congress and the Navy during the Second World War.

In early 1971 Dobrivir was approached by the Reservists Committee to Stop the War, a group of some 2,000 present and

Page 375

vorce Congress from the military. I think we accomplished a desirable end."

For his first thirty-five years Bill Dobrivir appeared to be on the track that leads to a comfortable living as a corporate Wash-

Page 376

forcement (or non-enforcement) of the Walsh-Healy Act, which requires government contractors to comply with Federal safety and health standards. Dobrivir won.

From inside the book

drug

Search

36 pages matching drug in this book

Page 133

client firms, insurers, lawyers assigned to cases are not always aware of the full ownership of client corporations. The result, inevitably, is the potential for grave embarrassment.

In the 1960s, Unimed, Inc., an amalgamation of small drug firms based in Morristown, New Jersey, got FDA permission to

Page 136

who practice at the FDA rank him among the top half-dozen specialists in Washington. He is particularly adept at the private bargaining with FDA officials that comprises an estimated ninety-five percent of a drug practice. In one instance, Land succeeded in keeping a product on the market even though its

Page 207

use of a hazardous drug when the available facts and the national drug law dictate such action. We believe that the facts show clearly that Panalba presents serious hazards to patients who take it which are not balanced by any benefit to be expected

From inside the book

27 pages matching fees in this book

Page 170

bar's self-written ban on discussion of client-attorney relations, seldom can the work performed be subjected to objective scrutiny. In some areas, however, the public has a direct financial interest. If a utility, for instance, pays unnecessary legal fees, the consumer pays the cost, in fractions of cents added to utility

Page 228

Hargrove wrote in another memo in August 1970, "the issuer [USPS] would normally have a good deal to say about the counsel the underwriters selected, although the underwriters themselves engaged such counsel and pay their fees."

Nine months later, in May 1971, USPS permitted the leading

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----- -----, -----, -----, -----, -----
a health hazard. The FDA in mid-1971 told the railroads to install chemical toilets on new trains after 1972.

Dobrevir feels fees will be the salvation of public-interest law,

From inside the book

filed

Search

17 pages matching **filed** in this book

Page 343

ment offer, Cutler, Mann, and other AMA representatives began bargaining for a consent decree even before the suit was formally filed (ultimately, on January 10, 1969, eleven days before the Johnson Administration left office). Cutler says the Justice Department even offered to negotiate a "three-client" con-

Page 364

any city would go to some remote court, say in San Francisco, to make it harder for me, or look for a 'best-deal' court, where they could rely upon a friendly judge," Banzhaf said. The court where the first appeal is filed assumes jurisdiction over all future proceedings in the case, hence timing is important. "I

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The data on the Sugar Lawyers is from hearings before the House Agriculture Committee, *Extension of the Sugar Act*, February–May 1971; a staff report of the same committee, *The United States Sugar Program*, December 31, 1970; and foreign agent registration statements filed with the Internal Security Division of the Department of Justice.

From inside the book

foreign

Search

43 pages matching **foreign** in this book

Page 47

am reluctant about telling people in the State Department that something I am advocating is a good thing for my client *and* the United States, too."

The distinction carries with it an independence that Laylin says he would not have if he acted as the agent of a foreign

Page 48

ful attempt to extradite the ousted dictator Marcos Perez Jimenez for trial for fiscal corruption. But as a private citizen, Acheson spoke with the authority of a former Secretary of State on issues involving foreign governments which Covington and

Page 49

dor in Mexico City. I learned much there about how business is done with foreign nations. It was invaluable." (Covington and Burling, which avoids hiring lawyers from the government, makes an exception in the international field: it actively scouts

From inside the book

former

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78 pages matching **former** in this book

Page 238

his firm followed the routine. After it happened [the Nixon ad], of course, everyone was saying how 'eager' we were to tell the world the President was our former partner. No matter what you do, you are criticized."

Page 274

Earle C. Clements, former Democratic Senator from Kentucky, is a registered lobbyist for the Tobacco Institute, an industry lobby group, and four tobacco corporations: Brown & Williamson, Liggett & Myers, Inc., R. J. Reynolds, and Philip Morris. Working closely with him at the Tobacco Institute is

Page 315

appointees, so they could better spend their time with the staff.

The fact that the person requesting the interview was a former government official was nigh automatic entry into his office, Caplin says. "It's a combination of camaraderie and courtesy. You find time for a former official. If a man who used to be

From inside the book

hearings

Search

42 pages matching hearings in this book

Page 201

~~challenge the proposed rulemaking. Whether you credit them, or lay it to sour grapes, many private practitioners still insist that there are few rulemaking hearings in which the burden does not fall harder upon the objector."~~

But one watches the regulatory commissions and asks, Does it

Page 351

■ ■ ■ Bruce Montgomery, director of the *pro bono* program at Arnold and Porter, was preparing for Interior Department hearings on the pipeline oil companies' plan to build across the Alaskan tundra to speed exploitation of the North Slope reserves. Arnold and Porter rence.

Page 392

Adverse Senate reaction to the duPont-Christian legislation was expressed in hearings before the Senate Finance Committee on March 17 and 24, 1965; and in floor debate the next two months. A somewhat more conspiratorial account is given in *Clark Clifford: Attorney at War*, by David Welsh and David Horowitz, *Ramparts*, April 1968.

From inside the book

hired

Search

18 pages matching **hired** in this book

Page 28

~~son who needed a job, or some old worn-out government lawyer~~
who wanted a place to rest. Mr. Burling was also extraordinarily lucky: very early along [1921], he hired Dean Acheson, who had the charisma to attract clients also, and who could handle himself in a courtroom; and he hired Paul Shorb. Mr.

Page 141

Fortas thing"; and frustration over whether a subtle change of direction is going to correct a very uneasy situation.

Until 1968 Arnold and Porter hired its new people almost entirely from government service. The policy gave the firm in-

Page 375

~~Covington Lawyer. After graduation from Harvard Law School, he~~
spent a year in Chile as a Fulbright Scholar, and then another year in Colombia as member of a Harvard advisory committee on tax reform. Covington and Burling hired Dobrevir on the basis both of his Harvard record and his fluency in Spanish, and

From inside the book

industry

Search

81 pages matching **industry** in this book

Page 309

even by the petroleum trade journals, and none by the daily press. Before this century ends, however, it stands to save the shale oil industry a billion dollars or more in taxes. And the shale oil companies worked fifteen years to get the loophole they wanted.

Page 334

~~planned revolution, with the Vietnam War, and its massive tax~~
nue demands, intervened. The auto industry, meanwhile, had encountered a more serious problem—the public furor over safety, stirred by Nader's exposés. General Motors, stupidly, hired a private detective to investigate Nader's private life.

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The last statement points up the importance the industry attached to damage suits looming over them. And Cutler also scoffed at Nader's complaint that settling the case without a trial would harm plaintiffs. He said the prospective litigants included "several of the leading and richest states in this country, very

From inside the book

johnson

53 pages matching johnson in this book

Page 90

Throughout the LBJ years, Chisolm's name was constantly linked—politically and professionally—to three United States Senators in a unique position to benefit clients of a Washington Lawyer: Lyndon B. Johnson, the Senate majority leader; Robert Kerr, whose love affair with the oil industry was one of

Page 103

... his law practice, which did not suffer from the hours Clifford spent at the White House. During a rambling conversation with reporters in 1967 Johnson remarked that "my friend Clark" earned \$1.3 million the previous year.

Page 238

was Nixon's liaison with the lame-duck Johnson Administration, while John Sears was the special emissary to Spiro T. Agnew; both took middle-echelon positions in the Administration. And corporate Washington—the lobbyists and trade associations and

From inside the book

karasik

8 pages matching karasik in this book

Page 264

tingency fee be agreed, all as outlined above.

The Karasik memo came to light in roundabout fashion. Assassins killed the Dominican dictator Rafael Trujillo in 1961,

Page 265

Karasik tried to explain away the letter by saying he wrote it while in the Dominican Republic. "I think that when I went down there, I probably had a recommendation, but I am not—I think it was not a firm which I knew personally. I believe I would have characterized it differently if I had known that firm

Page 266

Byrd before the Senate Finance Committee (of which he was chairman) considered the sugar quotas. Fagelson agreed to "think about" the matter, whereupon Efron sent a skeletonized account of the contact to Karasik, who was then in Ciudad Tru-

From inside the book

kennedy

38 pages matching kennedy in this book

Page 91

The East wouldn't take Johnson. Kennedy was too young, and Catholic besides. Adlai Stevenson—did anyone really want to retread *him* again? Hubert Humphrey, deep Southern trouble. Who else? Clifford put together an informal brain trust for Symington, and raised money for him, and wrote speeches, and

Page 92

taking a position *in* the Kennedy Administration (assuming, as Clifford did early, that Kennedy did win) but who intended to do a great deal of business *with* the Kennedy Administration. Clifford would handle the transition from Eisenhower to Kennedy. He went to work in early fall drafting a document detail-

Page 404

mission on, 52
Humphrey, Hubert H., 91, 150, 258
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129, 150, 268
appoints Clifford to Foreign Intelligence Advisory Board, 93

From inside the book

laylin

15 pages matching **laylin** in this book

Page 23

sources seaward of the two-nunarea-meter line. The United States government submitted a draft treaty—lawyer Laylin's handiwork, basically—to a United Nations committee in August 1970. On another front, as chairman of a special American Bar Association subcommittee, Laylin is mobilizing bar support

Page 46

particular attention to Republican Senator Arthur Vandenberg. Diplomatically, Laylin and O'Brian wrote speeches for the Greeks to present both in the Security Council and in the General Assembly. The issue there was support of guerrillas in Greece by Yugoslavia, Albania, and Bulgaria. "I never spoke

Page 49

~~the Foreign Service for eight people, after two years with~~
Morrow, Laylin returned to Sullivan and Cromwell; although he yearned for an international practice, some homework was in order. "Talk all you want to about being an 'international lawyer,'" Laylin says, "first you've got to learn to be a good lawyer."

From inside the book

lobbyists

11 pages matching **lobbyists** in this book

Page 238

was Nixon's liaison with the lame-duck Johnson Administration, while John Sears was the special emissary to Spiro T. Agnew; both took middle-echelon positions in the Administration. And corporate Washington—the lobbyists and trade associations and

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war as one reason.

One Congressional staff member suggested that the committee—and especially Poage—"bent over backwards to avoid showing any favoritism for Cooley." When chairman, Cooley preferred to deal with the sugar lobbyists in the privacy of his office.

From inside the book

percent

41 pages matching percent in this book

Page 5

could be transformed into instruments for the amassing of monopolistic corporate power. Attorney General John Mitchell, whose credentials as a capitalist are beyond reproach, said in a 1969 speech, "In 1948, the nation's two hundred largest industrial corporations controlled forty-eight percent of the manufac-

Page 8

young fellows to do the daily running; I sit up here and hustle the clients."

The statistical vagaries and qualifications notwithstanding, Washington is a heavily lawyered city. Washington has slightly less than one-half of one percent of the United States popula-

From inside the book

political

Search

65 pages matching political in this book

Page 24

crats. Although it is the foremost law office in a political town, Covington and Burling is not a blatantly political firm; one partner, John Douglas, son of former Senator Paul Douglas, managed to run a key committee for Senator George McGovern's Presidential campaign without once getting his name into

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Page 235

Page 238

each airline involved resorting to lawyers and lobbyists with political clout. In dizzying succession, the Civil Aeronautics Board overruled its own examiner's decision—one reached after three years of exhaustive study—only to be reversed in turn by John-

From inside the book

says

Search

87 pages matching says in this book

Page 61

explaining that corporations have a right to legal representation," a senior partner says. "I'm always getting questions like, 'Will I *have* to represent corporations? Or anyone else who comes along?' One year the question was, 'What, for example, would Covington and Burling do if you were asked to represent

Page 315

appointees, so they could better spend their time with the staff."

The fact that the person requesting the interview was a former government official was nigh automatic entry into his office, Caplin says. "It's a combination of camaraderie and courtesy. You find time for a former official. If a man who used to be

From inside the book

told

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Page 337

Cutler, in rebuttal, denies that criminal penalties were ever a priority item for the industry, although it "did and does" oppose them. Further, he notes, criminal sanctions were never in the auto safety bill—neither in the original Johnson Administration submission nor in the versions reported from the House and

From inside the book

matter

58 pages matching **matter** in this book

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Page 266

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From inside the book

million

40 pages matching **million** in this book

Page 94

other products to GM. Christiana owned some 63 million shares of the 281 million GM shares outstanding. The complex case dragged through the courts for a decade, twice going to the U.S. Supreme Court before the government won and Christiana was ordered to divest itself of all GM stock within ten years—a

From inside the book

practice

Search

90 pages matching **practice** in this book

Page 1

Page 1

Page 70

along with government, but not as a lawyer. The routine practice, he said, "does not interest me in the least. If a company represented had a whole series of matters before the Federal Power Commission, I would have to go out and hire a specialist. When I started my practice, I wanted to be the higher-level

From inside the book

staff

Search

63 pages matching **staff** in this book

Page 315

appointees, so they could better spend their time with the staff. The fact that the person requesting the interview was a former government official was nigh automatic entry into his office, Caplin says. "It's a combination of camaraderie and courtesy. You find time for a former official. If a man who used to be

From inside the book

supreme

35 pages matching **supreme** in this book

Page 121

act was the result of mental disease, the defendant could be acquitted on the ground of insanity. For the equally obscure Clarence Gideon, the Florida ne'er-do-well, Fortas took a Supreme Court assignment and won the case establishing that defendants, even indigent ones, must have counsel at all stages of a

From inside the book

thing

50 pages matching **thing** in this book

Page 62

or the firm's time to notable causes. Covington and Burling saw nothing, but watched with a good deal of detached amusement. "We had been doing this sort of thing in our own unorganized, unstructured, unpublic way," a senior partner states, "long before it became 'the thing to do' in Washington Law." Two out-

From inside the book

loan

Search

15 pages matching loan in this book

Page 232

loan. If it was not a first-class loan, we didn't want to make it. So I call up [the Fed] and find out—I tell them all the facts. 'Why are you calling me on this?' the man asked. Based on that conversation, and what we knew of the law, we gave the opinion the ~~loan was all right.~~

Page 245

says he was "uncertain" as to what statutes to proceed under. Guthrie helped steer Kennedy—and the government—toward emergency loan guarantee provisions of the Defense Production Act, intended to protect companies considered essential to the

Page 250

delighted if we had gotten the loan, but I was not upset they didn't." He also avows Mudge Rose neither expected nor received any financial benefit from the Penn Central work. "As a matter of fact," he said, "we probably lost \$50,000. They still owe us that much, and I'm not confident of getting more than a